

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY JACKSON,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2000

No. 214713

Wayne Circuit Court

LC No. 98-002820

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to twenty to forty years of imprisonment for the second-degree murder conviction, twenty to forty years for the assault with intent to murder conviction, and the mandatory term of two years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

This case arises out of the shooting death of Jermaine Webb on December 8, 1996, at approximately 4:15 a.m. in the city of Detroit. Darius Vaughn, a passenger in Webb's vehicle at the time of the shooting, testified at trial that two men in a green Jeep Cherokee, identified as defendant and codefendant Arthur Smart, opened fire with rifles as Webb was stopped at a red traffic light. Vaughn also identified Kenneth Tucker as the driver of the Jeep Cherokee. Vaughn stated that he had the opportunity to look at the three men in the Jeep Cherokee because it had passed him and Webb three times as they were driving on Chene. Vaughn also stated that he had known Tucker for about fifteen years, and that he had known defendant and Smart for about nine years. During the shooting, Vaughn, who was unhurt, was able to get out of the car and fled to a nearby house of a friend. Shortly after 5:00 a.m., police officers arrived on the scene. Vaughn also returned to the scene within twenty to twenty-five minutes, but did not identify the shooters to police officers at that time. At trial, Vaughn testified that he did not inform the police officers of the shooters because he feared for his life. In fact, it was not until February 11, 1998, when police officers sought Vaughn, that Vaughn actually identified defendant and Smart as the shooters.

Defendant, Smart, and Tucker were all charged with first-degree murder, assault with intent to murder, and defendant and Smart were also charged with felony-firearm. Defendant and Smart were tried before the same jury and ultimately convicted of second-degree murder, assault with intent to murder, and felony-firearm. Tucker was tried in a bench trial and acquitted of all charges.

## I

Defendant's first argument relates to the admission of similar act evidence at trial. Immediately before trial began, the prosecution moved to suppress evidence of the verdict of acquittal in codefendant Tucker's previous trial. The facts surrounding Tucker's previous trial was that Ricardo Mitchell, who testified in the present case, stated that on December 8, 1996, at about 4:40 a.m., he and his friend James Davis were about to enter a Chevrolet Tahoe as Tucker's green Jeep Cherokee pulled alongside them. Mitchell recognized Tucker as the driver and defendant and Smart<sup>1</sup> exited the Jeep and fired at Mitchell and Davis with rifles. Defendant, Smart, and Tucker were all charged with assault with intent to murder with regard to the assault of Mitchell and Davis. Tucker was acquitted in a bench trial before proceedings in the present trial. According to defendant's appellate brief, defendant and Smart were scheduled for trial; however, the charges were dismissed when the two complaining witnesses, Mitchell and Davis, failed to appear.

At the motion hearing, defendant's counsel argued that the verdict of acquittal was relevant and should be admitted if Mitchell was allowed to testify to the similar act evidence. Counsel explained that it was her theory that when Tucker was acquitted, Vaughn, a friend of both Mitchell and Davis, had a motive to lie about defendant's, Smart's, and Tucker's involvement in the present case in that Mitchell and Davis pressured Vaughn into identifying these three codefendants as the men who shot at him. Vaughn had never identified these three codefendants as being involved until after Tucker's acquittal. Counsel also noted that police officers contacted Vaughn about one month after Tucker's acquittal. Consequently, counsel argued that the police also pressured Vaughn to identify the three codefendants because no conviction had been obtained in the assault case involving Mitchell and Davis.

The trial court ultimately ruled that the evidence of the verdict was not relevant and that the three codefendants were not permitted to elicit evidence of the verdict of acquittal in Tucker's previous case. Defendant now argues that the trial court abused its discretion in excluding evidence of Tucker's acquittal for two reasons: (1) that it was relevant and, therefore, prejudicial to exclude the evidence of the acquittal, and (2) that it denied his right to confrontation and cross-examination.

We agree with the trial court that evidence of Tucker's acquittal in a separate matter was not relevant, and, therefore, there is no error here. Relevant evidence is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the

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<sup>1</sup> Mitchell also testified that he had known Tucker for about six or seven years, and had known defendant and Smart for about five years.

action more probable or less probable than it would be without the evidence.” MRE 401. Generally, relevant evidence is admissible, and irrelevant evidence is not admissible. MRE 402. However, even relevant evidence can be excluded as set forth under MRE 403. In any event, we do not believe that evidence of Tucker’s acquittal was relevant in the first instance because Vaughn’s motive for informing the police 1 ½ years after the shooting and identifying defendant, Smart, and Tucker as being involved in this shooting is not of consequence to the determination of this case. See *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995).<sup>2</sup>

Moreover, Vaughn was cross-examined extensively regarding his credibility. Specifically, the fact that Vaughn did not inform police officers that these three codefendants were involved when he was questioned about four hours after the shooting and the fact that Vaughn gave different testimony at the preliminary examination was brought out to the jury. Vaughn’s close friendship with both Mitchell and Davis was also brought out. Further, it was clearly established at trial that Vaughn did not inform the police that these three codefendants were involved until 1 ½ years after the shooting. Additionally, Vaughn’s contention that he did not inform the police for the time period that he did because he was afraid of these three codefendants was also strongly attacked. Because the reason for Vaughn waiting this length of time before identifying the three codefendants to the police, and the fact of the timing of the identification, are not facts of consequence to the determination of the case, defendant was not denied his right of confrontation or of cross-examination. See *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (the right of cross-examination does not include a right to cross-examine on irrelevant issues). Accordingly, defense counsel had a reasonable opportunity to attack Vaughn’s credibility during cross-examination, without referring to the verdict.

Therefore, we conclude that the trial court’s decision to exclude evidence of Tucker’s acquittal was not an abuse of discretion because the evidence was not relevant. Because Vaughn’s credibility was clearly attacked at trial, we find no error in the limitation of cross-examination regarding reference to Tucker’s acquittal.

## II

Defendant argues, in his supplemental brief filed in propria persona, that the trial court abused its discretion in admitting the similar act evidence because it was not admissible under MRE 404(b). The decision whether such evidence is admissible is within the trial court’s discretion and will be reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

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<sup>2</sup> Although the parties rely on *People v Bolden*, 98 Mich App 452; 296 NW2d 613 (1980), *People v Tyler*, 100 Mich App 782; 300 NW2d 411 (1980), and *People v Nabers*, 103 Mich App 354; 303 NW2d 205 (1981), rev’d 411 Mich 1046 (1981), we do not find these cases to be dispositive of this issue. These cases all involve a defendant’s acquittal in a prior trial where the prosecutor elicited evidence of the “bad act” of the defendant. These cases do not involve a codefendant’s acquittal in a different case. Evidence of a defendant’s acquittal has far different implications than evidence of a codefendant’s acquittal, especially where, as here, defendant wished to use evidence of Tucker’s acquittal as a means of attacking Vaughn’s credibility. Consequently, we find the trial court’s analysis of the issue as one of relevance to be correct.

Before trial, defendant moved to exclude the evidence, contending that the acts were not connected and that the evidence was far more prejudicial than probative. To admit similar or other acts evidence under MRE 404(b)(1), the evidence must be admitted for a proper purpose under MRE 404(b), it must be relevant under MRE 402, the probative value of the evidence must not be outweighed by unfair prejudice, and the trial court may provide a limiting instruction to the jury. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

Here, the similar act evidence, as testified to by Mitchell, was admitted to show identity, a proper purpose under MRE 404(b)(1). Further, the evidence was clearly relevant because it was defendant's contention that he did not commit the offenses in the present case. Whether defendant was one of the shooters was clearly a fact in issue for the jury. Further, we do not believe that the danger of undue prejudice substantially outweighed the probative value of the evidence. There was really no other physical evidence tying defendant to the shooting, other than the identification testimony of Vaughn. Further, the two shootings, as testified to by Vaughn and Mitchell, occurred very close in time. Moreover, the trial court instructed the jury immediately before Mitchell testified that he would be testifying about a separate act that occurred during the same night and that his testimony should only be considered for the purpose of identification and not for any other purpose, such as character or propensity to commit crimes.

Under these circumstances, the similar act testimony was properly admitted and the trial court did not abuse its discretion in admitting it.

### III

Defendant also argues in his supplemental brief that the trial court erred when it denied his motion for severance. The decision to sever or join defendants is within the discretion of the trial court and is, therefore, reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

Before trial, defendant requested orally that the trial court sever the trial because codefendant Smart "is going to be making some bizarre comments about [defendant] that are going to be detrimental and prejudicial to his case." Codefendant Smart had filed a motion to sever before defendant's request in this regard, which defendant joined. The trial court denied the motion, in an order dated August 3, 1998, without giving any reasons for the denial.

Based on the limited record before us, we find no abuse of discretion because none of the three codefendants testified at trial. Further, there were no police statements where the codefendants implicated defendant, but not themselves. Under these circumstances, we can discern no prejudice from the trial court's decision to not sever the trial. *Id.*; MCR 6.121(C), (D). Consequently, there is no error here.

### IV

Defendant also argues in his supplemental brief that he was denied the effective assistance of counsel. Because defendant did not move for a new trial or evidentiary hearing on this matter below, our review is limited to the record. *People v Sabin (On Second Remand)*, \_\_\_\_

Mich App \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (Docket No. 187226, issued September 26, 2000), slip op, p 2. For defendant to establish his claim that he was denied the effective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the deficient representation was prejudicial so as to deny defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show that counsel's performance was deficient, defendant must overcome the presumption that counsel's action constituted sound trial strategy under the circumstances. *Id.* To show prejudice, defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*, pp 302-303.

Defendant contends that trial counsel was ineffective because she failed to exercise due diligence in filing a motion to sever, she failed to properly cross-examine the witnesses, and she failed to set forth defendant's defense. With regard to the motion to sever, counsel moved three months before trial to sever, and joined in the written motion filed by codefendant Smart. The trial court decided to hold the motion in abeyance and denied the motion about one week before the trial started. Thus, counsel was certainly diligent in moving to sever the case. Moreover, as we have held in issue III, the trial court did not abuse its discretion in denying the motion to sever. Consequently, there is no showing of a deficient performance or prejudice in this regard.

With respect to the failure to properly cross-examine witnesses, defendant does not point to any specific conduct in the record where counsel was allegedly deficient. However, we have carefully reviewed the trial transcripts and do not conclude that trial counsel was deficient in her cross-examination of the witnesses.

With respect to defendant's claim that counsel did not properly present a defense, we disagree. Counsel's asserted defense was that defendant did not commit the charged crimes. She strongly attacked Vaughn's credibility and the inconsistencies in his statements, including his motive to lie. Contrary to defendant's claim, the trial court's decision to not admit the fact that Tucker was acquitted in the other shooting, as we have noted in issue I, was not an abuse of discretion and is not a decision in any event that is the result of counsel's deficient performance.

Accordingly, defendant has failed to show that he was denied the effective assistance of counsel based on the record before us.

## V

Lastly, defendant claims that his sentences of twenty to forty years are disproportionate to his background and the circumstances of the offense. Defendant's minimum sentences are well within the sentencing guidelines range of 120 to 300 months and are, therefore, presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to set forth any unusual circumstances to overcome this presumption of proportionality because the fact that defendant has no previous criminal record is accounted for in the guidelines range. Considering the violent and serious nature of these offenses, we certainly cannot conclude that the trial court abused its discretion in sentencing defendant. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995); *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Brian K. Zahra